Supreme Court, U.S.
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OFFICE OF THE CLERK

No._____

In The
Supreme Court of the United States
OCTOBER TERM, 1995

DANIEL R. BOWER,
Petitioner,
v.
JOYCE A. BOWER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO COURT OF APPEALS
FOR THE SIXTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

Walton Halleck Donnell
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17980 US 23
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January 31, 1996

QUESTION PRESENTED

Whether petitioner was denied procedural due process protected by the Fourteenth Amendment where the state's supreme court did not "review [for] final determination" his conflict-of-law case certified to it by a court of appeals pursuant to, and required by, the State Constitution, nor even notify petitioner that his conflict case was not going to be reviewed, where Article IV, Section 3(B)(4) of said constitution vests exclusive authority in "the judges of a court of appeals [to] find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination," and where, after inquiry, petitioner was informed by the Clerk that "the Supreme Court is vested with jurisdiction only when an interested party files the order certifying the conflict with the court [within] 30 days," despite petitioner's brief for reconsideration which stated that "on a federal constitutional level, 'both liberty and property are specifically protected by Fourteenth Amendment against any state deprivation which does not meet standards of due process, and such protection is not to be avoided by simple label that state chooses to fasten upon its conduct or its statute,' " citing "*Glaccio v. State of Pa.*, 86 S. Ct. (1966), 382 U.S. 399, 15 L.Ed. 2d 447."

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*28 U.S.C. §2403(b) may be applicable.

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IN THE SUPREME COURT OF THE UNITED STATES
October term, 1995

Daniel R. Bower,
Petitioner,
v.
Joyce A. Bower,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SIXTH DISTRICT

Daniel R. Bower, petitioner herein, respectively prays that a writ of certiorari issue to review the conduct of the Ohio Supreme Court in avoiding addressing the Fourteenth Amendment Due Process issue raised and briefed to said court, as seen by its Reconsideration Entry entered in the above-entitled case on September 20, 1995, which was the first time in the proceedings that said due process issue could have been raised by petitioner.

OPINIONS BELOW

The September 20, 1995, "RECONSIDERATION ENTRY" stating only "IT IS ORDERED by the Court that the motion for reconsideration be, and hereby is, denied" and signed by Thomas J. Moyer, Chief Justice, Case No. 95-734, is unreported, and is reprinted in Appendix herein at A, and said entry's avoidance of petitioner's "Fourteenth Amendment Due Process" question is herein sought to be reviewed. (Emphasis in original.) The prior entry of the Ohio Supreme Court, dated July 19, 1995, Case No. 95-734, is unreported, and is reprinted in the Appendix herein at B. The Decision and Judgment Entry of the Court of Appeals of Sandusky County, Sixth District, dated April 7, 1995, finding "that our decision in *Bower v. Bower* is in conflict with the judgment pronounced on the same question by the Courts of Appeal for the Fourth District ***and the Eleventh District," is unreported, and is reprinted in the Appendix at C, Case No. S-94-014.

STATEMENT OF JURISDICTION

The Reconsideration Entry of the Ohio Supreme Court was entered on September 20, 1995. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257, subparagraph (a). A Notice of Appeal To The Supreme Court of The United States was filed in the Supreme

Court of Ohio on September 29, 1995, Case No. 95-734, Appendix D.

An Application For An Extension of Time for a period of 30 days was granted by the Honorable Justice Stevens on December 20, 1995, to January 18, 1996, No. A-530.

CONSTITUTIONAL PROVISIONS, STATUES AND RULES INVOLVED

1. United States Constitution, Fourteenth Amendment:
"[N]or shall any state deprive any person of life, liberty, or property, without due process of law;"

2. Ohio Constitution, Article IV, § 3(B)(4):
"Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

3. Ohio Constitution, Article IV, § 5(B):
"The supreme court shall prescribe rules governing practice and procedure in all courts of this state, which rules shall not abridge, enlarge, or modify any substantive right."

4. Ohio Supreme Court Rule IV:
"SECTION 1. Filing of Court of Appeals Order Certifying a Conflict.
"When a court of appeals issues an order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, any interested party to the proceeding may institute an appeal by filing a copy of the order in the Supreme Court, along with copies of the opinions of the conflicting courts of appeals. The party that files the order certifying a conflict shall be considered the appellant. Failure to file the court of appeals order certifying a conflict within 30 days after the date of such order shall divest the Supreme Court of jurisdiction to consider the order certifying a conflict." (The entire text of Rule IV is reprinted in the Appendix at E3.)

STATEMENT OF THE CASE

On November 5, 1992, an amended version of Revised Code § 3105.171 [Equitable division of marital and separate property] became effective in Ohio. Subsequently, petitioner filed for and was granted a divorce from Respondent, she receiving a five-acre parcel of land under Ohio's new law. On an appeal as of right, the Sixth District Court affirmed, but certified the record to the Ohio Supreme Court for "review and final determination, pursuant to section 3(B)(4), Article IV, Ohio Constitution." Its Decision and Judgment Entry, journalized April 12, 1995, is in the Appendix at C, stating in part, "this court finds that our decision in *Bower v. Bower* is in conflict with the judgment pronounced on the same question by the Courts of Appeal for the Fourth District***and the Eleventh District." In the meantime, to be timely, petitioner had filed a jurisdictional memorandum in the Ohio Supreme Court with his Notice of Appeal, on the face of which, was endorsed the words, "Motion To Certify A Conflict Is Pending In The Court Of Appeals." Without any reference to the Sixth District Court's order certifying the record to it, the Supreme Court stated in its Entry of July 19, 1995:

> "Upon consideration of the jurisdictional memorandum filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question." (Reprinted in Appendix at B.)

Petitioner immediately wrote to the Clerk, dated July 24, 1995:

> "I received your notice of dismissal of the jurisdictional appeal in *Bower v. Bower*, dated July 19, 1995, Case NO. 95-734. "My question is: has the Supreme Court made any 'determination' yet in *Bower v. Bower* regarding the conflict of law issue? If so, I have never received any notice to date. Please advise."
> (Reprinted in full in Appendix at E1.)

The Clerk responded by letter, dated July 26, 1995:

> "A search of the court's docket does not indicate that there is a certified conflict proceeding involving the above-named matter pending before the Supreme Court.
> "Please be advised that an order certifying a conflict does not come before the Supreme Court automatically upon an appellate court's certification of the conflict. Pursuant

> to S.Ct.Prac.R.IV(1), the Supreme Court is vested with jurisdiction only when an interested party files an order certifying the conflict with the court. Failure to file the order within 30 days divests the Supreme Court of jurisdiction to consider the conflict." (Reprinted in full, Appendix E2.)

Petitioner timely filed a Motion For Reconsideration, raising, for the first time possible, his federal question, with the following words:

> "ARGUMENT IN SUPPORT OF RECONSIDERATION
>
> "*Constitutional Violation No. 1*: Supreme Court Practice Rule IV [Failure to file the court of appeals order certifying a conflict within 30 days after the date of such order shall divest the Supreme Court of jurisdiction to consider the order certifying a conflict] is unconstitutional on its face as it diminishes the exclusive grant of power given to courts of appeals in the Ohio Constitution, Article IV, Section 3(B)(4).' (Page i, Motion For Reconsideration.)
>
> "Clearly, the Ohio Supreme Court cannot diminish the exclusive grant of power given to an inferior court of appeals in the Ohio Constitution. That is unconstitutional. .*** (Page 4.)
>
> "Further, on a federal constitutional level, 'both liberty and property are specifically protected by Fourteenth Amendment against any state deprivation which does not meet standards of due process, and such protection is not to be avoided by simple label that state chooses to fasten upon its conduct or its statute.' *Glaccio v. State of Pa.*, 86 S. Ct. 518 (1966), 382 U.S. 399, 15 L.Ed.2d 447. This infringement of the court of appeals' grant of power to have its certified case of conflict reviewed in the Supreme Court in turn infringes upon an Ohio litigant's right to have his 'certified' case reviewed by the Supreme Court, thereby diminishing his right under the Ohio Constitution without due process under the Fourteenth Amendment. Whether one judges the restrictive rule (IV, Section 1) by the Federal or State Constitution, it simply cannot pass constitutional muster. The Supreme Court simply cannot constitutionally diminish a litigant's right under the Ohio Constitution to have his certified case

from the court of appeals reviewed in the Supreme Court because of the requirements of a 30-day-diminishing-right rule whose only justification, as a procedural rule, would be that of notice from a litigant--'interested party'--yet here no notice is needed, or required by the Court of Appeals or the Ohio Constitution." (Page 5, Motion For Reconsideration.)

These excerpts from petitioner's Motion For Reconsideration clearly raised, for the first time possible, his federal question under the Fourteenth Amendment yet Ohio's highest court did not address his federal question at all, avoiding it completely as shown by its Entry on September 20, 1995, no hearing, no opinion, at Appendix A:

"IT IS ORDERED by this Court that the motion for reconsideration in this case be, and hereby is, denied."

REASONS FOR GRANTING THE WRIT

The conduct of the Ohio Supreme Court is enacting and applying, its Rule IV, as evidenced by its two Entries on September 25, 1995, and July 19, 1995, should be reviewed by this Court because said conduct and rule violate the greatest contract that each and every Ohio citizen has with the State of Ohio, i.e., the consensual and constructive contract known as the Ohio Constitution.

The Ohio, and every State, Constitution is a consensual contract because there are no external formalities or symbolic acts to fix the obligation between the State, on one side of the contract, and its millions of citizens on the other side. By either being born in, or moving into and taking up a household or business or both, the domiciled persons fix their obligations and rights with the State.

The Ohio, and every State, Constitution is a constructive contract with its millions of citizens because each state constitution is the supreme law of that state, prescribing rights and liabilities of the state and its citizens who have not in reality entered into a real contract at all, but circumstances between a state and one of its citizens, from time to time, make it only just that one should have a right, and the other a liability.

"CONSTITUTION. In American Law. The written instrument agreed upon by the people of the Union or a particular state, as the absolute rule of action and decision for all departments and officers of the government in

> respect to all the points covered by it, which must control until it shall be changed by the authority which established it, *and in opposition to which any act or ordinance of any such department or officer is null and void.*" Cooley, Constitutional Limits 3. (Emphasis added.)"

Supreme Court Practice Rule IV(1), reprinted in full at Appendix E3 and E4 is clearly "null and void", where on its face, it severely and unnecessarily diminishes Ohio citizens' right to have their certified conflict-of-law cases "review(ed) [for] final determination." Rule IV (1) is clearly "null and void" as shown by this section of the Ohio Constitution, Article IV, § 5(B):

> "The supreme court shall prescribe rules governing practice and procedure in all courts of this state, which rules shall not abridge, enlarge, or modify any substantive right."
> And Article IV, § 3(B)(4) states:
> "(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

This section of the Ohio Constitution--the consensual contract between Ohio and its citizens--has two clear-cut provisions which clearly require (1) that the judges of a court of appeals "shall certify the record of the [conflict of law] case to the supreme court" and (2) the supreme court "review [it for] final determination."

The Sixth District Court of Appeals "certif(ied) the record of [petitioner's] case to the supreme court" by order journalized on April 12, 1995. The Supreme Court of Ohio never "review(ed) it [it for] final determination." Result? Ohio's new law on marital property, both real and personal, is still uneven in Ohio as the Sixth District Court found its decision, in the case at bar, in conflict with two other sister courts, the Fourth and the Eleventh.

The plain purpose of this particular section of the Ohio Constitution is that the law in Ohio be even among its citizens living in its 12 districts. And since the Supreme Court of

Ohio is the only court in Ohio that has authority to make the law even in all 12 districts of Ohio, why would it make a diminishing-right rule forcing an intermediary--"any interested party"-- to file the court-of-appeals certification order to the supreme court when the simplest, surest, *most* direct way to get the conflict of law order to the Supreme Court is a rule directing the court of appeals to file the order.

For due process purposes, where is the compelling interest necessary for a state rule of court to infringe upon the fundamental right of all citizens to have the law even among the citizenry? That the present day 30-day time limit is arbitrary can be seen from the language of one of several Ohio cases that deal with the matter, *Duncan v. State, Ex Rel Williams* (1928) 119 Ohio St. 453, 164 N.E. 527, opinion per Marshall, C.J., at 456:

> "It will be seen that no time is fixed by the Constitution within which the case must be docketed in the Supreme Court. In *City of Akron v. Roth*, 88 Ohio St., 456, 103 N.E., 465, this court *arbitrarily* fixed a limitation of 70 days for filing a motion to certify, and at a later date this court established a rule requiring such motion to be filed within 30 days after the entry of judgment in the Court of Appeals. In *Crawford v. Weidemeyer*, 93 Ohio St, 461, 113 N.E., 267, this court *again arbitrarily* fixed a limitation of 70 days within which a petition in error must be filed in this court where the cause has been certified on the ground of conflict." (Emphasis added to the court's language, arbitrarily.)

Several Supreme Court cases have taken up the arbitrary 70-down-to-30-days time limit rule of Ohio's highest court, going back to 1916, but petitioner has not found a compelling interest necessary for the State of Ohio to require "any interested party" to file the certification order in the supreme court rather than have the court of appeals itself *file* the order, an inferior court directly to the supreme court, both courts having a duty to each other and the Ohio citizens in Article IV, § 3(B)(4).

Another reason for this Court to grant certiorari is that petitioner's case is important to the public, not just to himself as a party. For this Court to allow said Rule IV(1) to stand is to allow the Supreme Court to be superior to Ohio law, the Ohio Constitution itself, the consensual contract between the

State and its citizens. Since *Board of Regents v. Roth*, 408 US 564, 33 L Ed 2d 548, 92 S Ct 2701 (1972), this Court has granted certiorari to a number of contract cases where a question of procedural due process was raised as involving "interests encompassed within the Fourteenth Amendment's protection of liberty and property," *Roth, supra.*

And time will not "further illume or completely outmode" the procedural due process issue in the case at bar. Petitioner believes the Ohio cases on Rule IV(1) since 1916 show that with clarity.

CONCLUSION

For the foregoing reasons, the petitioner prays that his petition for a writ of certiorari be granted.

Respectively submitted,

Walton H. Donnell
Counsel For Petitioner

Date: January 31, 1996.

APPENDIX

The Supreme Court of Ohio

1995 TERM

To wit: September 20, 1995

Daniel R. Bower, Appellant,	:	Case No. 95-734
v.	:	RECONSIDERATION ENTRY
Joyce A. Bower, Appellee.	:	(Sandusky County)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. S9414)

"s/Thomas J. Moyer"
THOMAS J. MOYER
Chief Justice

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The Supreme Court of Ohio

1995 TERM

To wit: July 19, 1995

Daniel R. Bower Appellant,	: :	Case No. 95-734
v.	:	ENTRY
Joyce A. Bower Appellee.	: :	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Walton R. Donnell, Esq.

(Sandusky County Court of Appeals; No. S9414)

"s/Thomas J. Moyer"
THOMAS J. MOYER
Chief Justice

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IN THE COURT OF APPEALS OF SANDUSKY COUNTY

Daniel R. Bower
Appellant
v.
Joyce A. Bower
Appellee

Court of Appeals No. S-94-014

Trial Court No. 93-DR-760

DECISION AND JUDGMENT ENTRY

Decided: APR 7, 1995

Linda S. Connors
Clerk

Journalized
April 12, 1995 Vol. 21 Pg. 184

This case is before the court on appellant's "Motion to Certify A Conflict," filed on March 6, 1995.

Upon consideration thereof this court finds that our decision in Bower v. Bower is in conflict with the judgment pronounced on the same question by the Courts of Appeal for the Fourth District, sitting in Scioto County, in the case of Brown v. Brown (Mar. 6, 1992), Scioto App. Nos. 1974, 1977, unreported and the Eleventh District, sitting in Ashtabula County, in the case of Kampf v. Kampf (May 3, 1991), Ashtabula App. No. 90-A-1503.

The question on which the conflict exists is whether or not the conveyance of real property to a husband and wife as joint tenants with rights of survivorship under the circumstances as established by the facts of Bower v. Bower resulted in the property conveyed being marital property as a matter of law.

Accordingly, this court hereby certifies the record of this case to the Supreme Court of Ohio for review and final determination, pursuant to section 3 (B) (4), Article IV, Ohio Constitution.

George M. Glasser, J. "s/George M. Glasser"
JUDGE

Charles D. Abood, P.J. "s/Charles D. Abood"
JUDGE

Melvin L. Resnick, J. "s/Melvin L. Resnick"
CONCUR. JUDGE

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IN THE SUPREME COURT OF OHIO

Daniel R. Bower, Appellant,	:	Case No. 95-734
v.	:	NOTICE OF APPEAL TO THE SUPREME COURT
Joyce A. Bower, Appellee.	:	OF THE UNITED STATES FILED SEP 29 1995.

Notice is hereby given that Daniel R. Bower, the appellant above-named, hereby appeals to the Supreme Court ot the United States from the final judgment of the Supreme Court of Ohio dated July 19, 1995 (and its reconsideration entry dated September 20, 1995) declining to hear appellant's case and dismissing his appeal "as not involving any substantial constitutional question."
This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (a).
Dated September 29, 1995.

Walton H. Donnell (Reg. No. 0020371)
Counsel For Appellant
17980 US 23
P.O. Box 58
Woodville, OH 43469
Phone: (419) 849-3252

PROOF OF SERVICE
A copy of the foregoing Notice of Appeal to the UNited States Supreme Court was sent by regular U.S. Mail, postage prepaid, to Frederic Matthews, counsel for appellee, 100 S. Main Street, Bowling Green, OH 43402, this 29th day of September 1995.

"s/Walton H. Donnell"
Walton H. Donnell

Law Offices

WALTON H. DONNELL, ATTORNEY
PERSONAL INJURY, PROBATE, WILLS
REAL ESTATE
17980 US 23, P.O. BOX 58
WOODVILLE, OH 43469
PHONE: (419) 849-3252

July 24, 1995

Marcia Mengel, Clerk
Supreme Court of Ohio
30 E. Broad St.
Columbus, OH 43266

RE: ENTRY OF SUPREME COURT DATED JULY 19, 1995 IN BOWER v. BOWER CASE TO SUPREME COURT BY SIXTH DISTRICT COURT OF APPEALS, DATED APRIL 7, 1995

Dear Ms. Mengel,

I received your notice of the dismissal of the jurisdictional appeal in Bower v. Bower, dated July 19, 1995, Case No. 95-734.

Enclosed is a copy of a Decision and Judgment Entry, file stamped April 7, 1995, of the Court of Appeals of Sandusky County (Sixth District) that certified "the record of this case to the Supreme Court of Ohio for review and final determination, pursuant to section 3(B)(4), Article IV, Ohio Constitution."

My question is: has the Supreme Court made any "determination" yet in Bower v. Bower regarding the conflict of law issue? If so, I have never received any notice to date. Please advise.

Thank you for your attention to this matter, and a response.

Yours truly,

"s/Walton H. Donnell"
Walton H. Donnell

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The Supreme Court of Ohio

July 26, 1995

Walton H. Donnell
17980 U.S. 23
Woodville, Ohio 43469

Re: Daniel R. Bower v. Joyce A. Bower, Sandusky County Court of Appeals Case No. S-94-014

Dear Mr. Donnell:

A search of the court's docket does not indicate that there is a certified conflict proceeding involving the above-named matter pending before the Supreme Court.

Please be advised that an order certifying a conflict does not come before the Supreme Court automatically upon an appellate court's certification of the conflict. Pursuant to S. Ct. Prac. R. IV(1), the Supreme Court is vested with jurisdiction only when an interested party files the order certifying the conflict with the court. Failure to file the order within 30 days divests the Supreme Court of Jurisdiction to consider the conflict.

Sincerely,
"s/Regina M. Koehler"
Regina M. Koehler
Deputy Clerk

/rmk

RULE IV. CERTIFICATION BY COURT OF APPEALS BECAUSE OF CONFLICT

Section I. Filing of Court of Appeals Order Certifying a Conflict.

When a court of appeals issues an order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, any interested party to the proceeding may institute an appeal by filing a copy of the order in the Supreme Court, along with copies of the opinions of the conflicting courts of appeals. The party that files the order certifying a conflict shall be considered the appellant. Failure to file the court of appeals order certifying a conflict within 30 days after the date of such order shall divest the Supreme Court of jurisdiction to consider the order certifying a conflict.

Section 2. Supreme Court Review of Court of Appeals Order Certifying a Conflict.

The Supreme Court will review the court of appeals order certifying a conflict.

(A) If the rule of law upon which the alleged conflict exists is not clearly set forth in the order certifying a conflict, the Supreme Court may remand the case to the court of appeals with an order that the court of appeals clarify the issue presented.

(B) If the Supreme Court determines that a conflict does not exist, it will issue an order dismissing the case.

(C) If the Supreme Court determines that a conflict exists, it will issue an order finding a conflict, identifying those issues raised in the case that will be considered by the Supreme Court on appeal, and ordering those issues to be briefed.

Section 3. Briefs; Supplement to the Briefs.

Within 40 days after the Supreme Court has issued an order finding a conflict, the appellant shall file a merit brief, in conformance with S. Ct. Prac. R. VI, and a supplement, in conformance with S. Ct. Prac. R. VII. The parties shall otherwise comply with the requirements of S. Ct. Prac. R. VI and VII. In their merit briefs, the parties shall brief the issues

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identified in the order of the Supreme Court as issues to be considered on appeal.

Section 4. Effect of Pending Motion to Certify a Conflict Upon Discretionary Appeal or Claimed Appeal of Right Filed in Supreme Court.

(A) If a party has perfected a discretionary appeal or a claimed appeal of right with the Supreme Court in accordance with S. Ct. Prac. R. II, Section 2 (A), but also has timely moved the court of appeals to certify a conflict in the case, that party shall file a notice with the Supreme Court that a motion to certify a conflict is pending in the court of appeals. The Supreme Court will stay consideration of the jurisdictional memoranda filed in the discretionary appeal or claimed appeal of right until the court of appeals has determined whether to certify a conflict in the case.

(B) If the court of appeals determines that a conflict does not exist, the party that moved the court of appeals to certify a conflict shall file a notice of that determination with the Supreme Court within 12 days after the date of the court of appeals entry. In accordance with S. Ct. Prac., R. III, the Supreme Court will consider the jurisdictional memoranda filed in the discretionary appeal or the claimed appeal of right.

(C) If the court of appeals certifies the existence of a conflict and a copy of the court of appeals order is filed with the Supreme Court in accordance with Section 1 of this rule, the Supreme Court will consolidate the certified conflict case with the discretionary appeal or the claimed appeal of right. The Supreme Court will review the court of appeals order certifying a conflict when it reviews the jurisdictional memoranda filed by the parties. In accordance with Section 3 of this rule and S. Ct. Prac. R. III, Section 3, the Supreme Court will issue an order determining both whether a conflict exists and whether to allow the discretionary appeal or the claimed appeal of right.